MOVES

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A new critique weighs in, as tends to happen every twenty years or so.[1] Because of the long interval, there is little institutional memory—hardly anyone recalls what happened last time, when the Realists consigned mechanical jurisprudence to oblivion,[2] for example, or when law and society dispatched the comfortable beliefs of 1950s-style law-and-policy.[3] Even cls's attack on neutral principles and legal process is now some fifteen years old;[4] few remember the difficult times the movement experienced in its early years.[5]

Now we have the critique of normativity, raising questions about our scholarship, teaching, and indeed our very self-concepts as lawyers and writers.[6] Audacious critics are saying that *normativos* have nowhere to go,[7] that much of our most cherished discourse is empty, pointless, and self-referential.[8] Writers are implying that the priesthood is the last refuge for lost souls displaced by earlier reforms.[9]

The critique, then, is here. What will happen? The returns are not in. But judging from some comments we have received and the one reply article included in this issue,[10] it seems a good bet that

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[1] For the opinion that this interval is shortening, however, see Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167, 167 (1990).

[2] The term is from Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908) [hereinafter Pound, *Mechanical*]. *See also* Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935); Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697 (1931).

[3] *See* Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575 (1984) (placing law-and-society movement within Critical mainstream).

[4] For a history of the movement, see Schlegel, *Notes Toward An Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies*, 36 STAN. L. REV. 391 (1984).

[5] *See, e.g.*, Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222 (1984) (describing the movement as anti-law, corrosive, and inviting its members to depart the law school).

[6] *See The Critique of Normativity*, 139 U. PA. L. REV. 801 (1991); *see also* Schlag, *supra* note 1.

[7] *See* Schlag, *supra* note 1.

[8] *See id.* at 170-71, 180-83; Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801, 834-52 (1991).

[9] *See* Delgado, *Norms and Normal Science: Toward a Critique of Normativity in Legal Thought*, 139 U. PA. L. REV. 933, 935-38, 953-55 (1991).

[10] *See* Radin & Michelman, *Pragmatists and Poststructural Critical Legal Practice*, 139

responses will take the following forms. In fact, if Pierre Schlag is right about normativity's *inscription* in our thought and culture,[11] such responses are inevitable, programmed, as certain to come as the swallows' return to Capistrano.

Move number one. The first move is to portray the new critique as self-contradictory. How can you be urging a retreat from normativity?[12] That is itself a normative stand—you wouldn't be urging it unless you thought it was a good thing, unless you believed there is something wrong about normative scholarship and practice.[13] You are *normativos* yourselves—which just shows how impossible it is to dispense with normativity; your very argument refutes itself.

Comment. But the response also proves *our* point—that normativity is so deeply inscribed that we cannot even begin to think of a new intellectual contribution except in terms of taking sides, being for or against something, praising this value or condemning that one.[14] And besides, there is something déjà vu in the claim that our arguments are self-cannibalizing.[15] Imagine the following dialogue between a young Legal Realist and a mechanical jurisprude:[16]

> Scene: The faculty lounge. Date: Any time in the early 1900s.
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> *Mechanical jurisprude*: So you and your friends are attacking us for being "mechanical" and holding that law consists of drawing conclusions from premises consisting of rules of law and the facts of particular cases.
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> *Young Realist*: We've *showed* that this is so—law cannot be simply a matter of deductive logic. There is much more to it than that, and we can prove it—and in fact have done so.[17]

U. PA. L. REV. 1019 (1991).

[11] *See* Schlag, *supra* note 1, at 174-76, 180-87.

[12] *See* Radin & Michelman, *supra* note 10, at 1021-22 (raising question whether Schlag is not guilty of a performative contradiction).

[13] *See id.* at 1021-22, 1055-56.

[14] *See supra* note 11 and accompanying text.

[15] *See* Schlag, *Cannibal Moves: An Essay on the Metamorphoses of the Legal Distinction*, 40 STAN. L. REV. 929 (1988). Literal—that is, physical—self-cannibalism should obviously remain limited to inessential parts (like hangnails). Psychotherapy and critique, however, show that in the mental realm, many items of our repertoire are better jettisoned.

[16] *See* Pound, *Mechanical*, *supra* note 2. The Realists criticized the formalists as holding a crabbed, conceptually narrow, and impossibly mechanical view of law.

[17] For examples of the devastating attack mounted by the Realists on the

> *Mechanical jurisprude*: We needn't get into that. Let me just ask you one question: Is your attack on us logical or illogical? If illogical, why should anyone pay attention to it? And if logical, you've just proved our point—that law and legal analysis must be logical. You refute your own position—you're snared in a self-contradiction.

Today, we can all see what is wrong with the formalist's response. But my guess is that few did at the time.[18] There is nothing self-contradictory about using a tool to dismantle a structure and then using a different tool to build a better one. There is nothing wrong with abandoning a ladder after having used it to climb to a point where one is no longer necessary.

Move number two. The second move finds a strain or contradiction, not within the new critique itself, but between it and the old order, or some presupposition intrinsic to it. Radin and Michelman, for example, find the critique of normativity inconsistent with our current understanding of agency[19] and the role of language.[20] The critique must therefore be wrong.

Comment. Every paradigm change will look wrong to those caught up in the old regime.[21] To say the new approach contradicts our current understanding about *X, Y,* or *Z* is to fail to take the critique seriously—i.e., on its own terms. Paradigms change when everyone realizes the new paradigm is simpler, cleaner, and more liberating than the old one—and that these advantages outweigh the costs of abandoning old assumptions (like *X, Y,* and *Z*).[22]

Move number three. The third move charges the critics with nihilism. The commentator cannot imagine what would replace the old regime, believes that the critic cannot either, and dismisses the critic's few, sketchy positive suggestions as Utopian or unworthy of

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formalists and Langdellians, see sources cited *supra* note 2.

[18] *See generally* Delgado & Stefancic, *Why Do We Tell The Same Stories?: Law Reform, Critical Librarianship, and the Triple Helix Dilemma*, 42 STAN. L. REV. 207 (1989) (concerning the predicament of a law reformer attempting to craft, or even envision, new legal approaches).

[19] *See* Radin & Michelman, *supra* note 10, at 1058.

[20] *See id.* at 1027 (casting doubt on critique because it contradicts current "understandings of language, knowledge . . . and their interconnections").

[21] For a classic treatment of this practice, from a leading sociologist of knowledge, see T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970).

[22] According to Kuhn, scholars in a discipline will cling to the old paradigm until the costs of doing so exceed the costs of transition to the new one. *See id.*

serious consideration.[23] The structure of this move is: The critique would destroy all that I hold dear. Therefore, it is wrong.

Comment. Sometimes holy things are wrong. Sometimes nothing is better than something—it all depends on what that something is. Sometimes it will turn out that there was nothing there in the first place. At one point in our history, scientists believed in the ether, refusing to believe that space could be empty. Those who first attacked this belief were told that their ideas were preposterous, nihilist, irresponsible—there must be something out there.[24] Were the early Legal Realists and Crits nihilists? Of course not. Today we see that they have a rich program of their own. But their early critics saw them in those terms; today very few do.

Move number four. The fourth move accuses the critic of *essentializing*. There is not one normativity, but rather many normativities.[25] What we say about one may not hold true of the others. A fault with, say, law and economics may not hold true for communitarianism, and so on.

Comment. What this move ignores is that just as the critique may *not* hold true for all varieties of normativism, it may also hold true for all or most of them. Imagine an early formalist making the same reply to a Realist (i.e., "There are many mechanical jurisprudences, not one")—or someone defending a disease—say measles—on the ground that not all forms of it are as serious as others. There may be many normativities, but they all may be subject to one or more variants of the critique. One should not dismiss a critique merely because it sweeps in a variety of targets—indeed one could argue that a critique gains power to the extent that it holds true in a variety of cases.

Move number five. Move number five refuses to believe that we could possibly be urging that there is something systemically troubling about normative-talk. You must be criticizing just *this* value or *that*. You must be urging us to reshuffle our set of norms,

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[23] *See* Radin & Michelman, *supra* note 10, at 1055-56 (warning of the vacuum that would result if normativity were jettisoned).

[24] For discussion of scientific change and scientists' resistance to it, see J.G. KEMENY, A PHILOSOPHER LOOKS AT SCIENCE (1959); T. KUHN, *supra* note 21 (contending that paradigms supplant each other only when "normal science" becomes so conflict-ridden and unable to explain experimental results that costs of status quo exceed those of working toward new paradigm).

[25] *See* Radin & Michelman, *supra* note 10, at 1023 (contending that there is "not one . . . but many normativities").

replacing efficiency, say, with the Rawlsian difference principle, or some other value with yet another, favorite one.[26]

Comment. Wrong. The Realists were not urging that we replace Aristotelian logic with Boolean algebra or some other, more sophisticated, form of law-as-logic. They were insisting that law cannot be seen as logic at all—that simply was not a plausible understanding of legal judgment. Their critique was not piecemeal, but broad and general. So is ours. We have no favorite, hidden value we are waiting to spring on unsuspecting readers once we have cleared away the competition. We want to start an entirely new way of looking at law as a discipline.

Move number six. The sixth move is co-optation. Of course there are problems with normativity, excesses, bad uses of it, and so on. We have been saying this all along. Join the crowd.[27]

Comment. Good. We are glad to acknowledge intellectual forerunners—we have named some[28]—and fellow travelers. But note our passages about retraining.[29] You are not free of the normative habit until you no longer long for the high you get from cheerleading with a like-minded normativo, like a spectator at an athletic event. There is no such thing as the selective critique of normativity. All views that see law and legal scholarship as inherently, basically, fundamentally normative must be reconsidered.[30]

Move number seven. But then, what will (should) we do?

Comment. You are re-inscribing yourself again. Try our variety of it: Cycle back to page 801.[31]

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[26] *See id.* at 1055-56.
[27] *See id.* at 1019-20 (agreeing, in part, with critique).
[28] *See* Delgado, *supra* note 9, at 934 n.4.
[29] *See id.* at 959-62.
[30] *See id.*; Schlag, *supra* note 1.
[31] *See The Critique of Normativity*, *supra* note 6.